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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

March 23, 2017

10:09 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

Doc #10310 Hearing RE: ResCap Liquidating Trust's Ninety-Sixth Omnibus Objection to Claims (No Liability Claims). Hearing on the Omnibus Objection, solely as it relates to the Bank of America Claim, will go forward on 3/23/17. Hearing re: all other claims is adjourned to 5/11/2017 at 10:00 a.m.

(CC: Doc #10311) Motion of the ResCap Liquidating Trust for Final Decree Closing Chapter 11 Case of Executive Trustee Services, LLC filed by Joseph A. Shifer on behalf of ResCap Liquidating Trust.

(CC: Doc #10296) ResCap Borrower Claims Trusts Ninety-Fifth Omnibus Objection to Claims ((I) No Liability Borrower Claims, (II) Reduce and Allow Borrower Claims, and (III) Allow in Full Borrower Claim).

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A P P E A R A N C E S:

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BY: NATHANIEL ALLARD, ESQ.

ALSO PRESENT:

JILL HORNER, ResCap Liquidating Trust (Telephonic)
JAMES P. KENNEDY, Pro Se (Telephonic)
SARA LATHROP, Residential Capital Estates (Telephonic)

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: All right, please be seated.

4 We are in Residential Capital, 12-12020.

5 All right.

6 MR. ALLARD: Good morning, Your Honor; Nathaniel
7 Allard of Kramer, Levin, Naftalis & Frankel for the ResCap
8 Liquidating Trust. The first matter on the agenda is the
9 ResCap Liquidating Trust ninety-sixth omnibus objection to
10 claims. It was filed on February 21st, 2017 at ECF number
11 10310.

12 In support of the objection, the Trust submitted the
13 declaration of Jill Horner who is the Liquidating Trust chief
14 financial officer, and I believe Ms. Horner is on the phone if
15 you have any questions.

16 THE COURT: All right. Go ahead Mr. Allard.

17 MR. ALLARD: So some background: Pursuant to the
18 objection, the Liquidating Trust objected to twenty-five
19 claims; twenty-four of those were virtually identical claims
20 filed by Royal Bank of Scotland and its affiliates. We have
21 been in discussions with RBS and so we have adjourned the
22 objection as it pertains to those twenty-four claims. So the
23 only claim going forward today is claim number 5271 filed by
24 Bank of America.

25 THE COURT: Do you have a copy of the claim?

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 MR. ALLARD: I do.

2 THE COURT: It's not attached to the moving papers; at
3 least, I didn't see it.

4 MR. ALLARD: I do.

5 May I approach?

6 THE COURT: Yes, please.

7 Thank you. Give me a chance to look at it, okay?

8 (Pause)

9 THE COURT: Go ahead.

10 MR. ALLARD: Okay, so if I could provide just some
11 background: We have been in contact with counsel to Bank of
12 America and understand the claim related to an alleged improper
13 lien release. And when we were in contact with them, we
14 offered to work with them to resolve the claim, at which point
15 they informed us that they no longer hold any interest in the
16 property or the claim. For whatever reason, they were not able
17 to withdraw the claim so we were constrained to include them on
18 the objection. And they did not respond to the objection.

19 THE COURT: Did ResCap, GMAC Mortgage, LLC release the
20 lien on the property that's the subject of the proof of claim?

21 MR. ALLARD: My understanding of the facts is there
22 was they argued there was an improper lien release, whereas,
23 there was a -- I think it was a clerical mistake where they
24 gave the address to an adjacent property. So that was the
25 nature of the misunderstanding --

1 THE COURT: Part of the problem I have in reading
2 the -- I have no clue, other than in the objection where you
3 say that the basis for Bank of America's claim was improper
4 release of the lien, I have no knowledge, no facts set out
5 about did ResCap mistakenly release the lien on the property,
6 what the status of that is.

7 MR. ALLARD: Unfortunately --

8 THE COURT: Let me just finish.

9 MR. ALLARD: Sorry.

10 THE COURT: I don't know whether the view that
11 the -- yes, you have an affidavit declaration in support of the
12 objection. It's not particularly informative; you say you've
13 had discussions with Bank of America. I had not been able to
14 review the claim previously, so let me come back and let me
15 understand. Tell me what happened. What did GMAC do with
16 respect to the lien on this property?

17 GMAC was servicing the loan on the property at one
18 time, correct?

19 MR. ALLARD: That is my understanding.

20 THE COURT: And did it release the lien on the
21 property?

22 MR. ALLARD: So unfortunately, our understanding is
23 limited to the proof of claims not very informative, either, so
24 when we talked to them we tried to get this information. So
25 let me -- I want to make that clear; my understanding is they

1 believe that instead of releasing the lien on one property,
2 they released -- the argument is they released the lien on an
3 adjacent property that had a slightly different address.

4 I don't have many facts beyond that; that's why we
5 tried to contact them, and they informed us that they weren't
6 really interested in pursuing the claim anymore. And we
7 did -- the affidavit of service at ECF 10319 indicates that we
8 served the objection on them, as well, after our many calls and
9 emails back and forth.

10 THE COURT: Whoever is typing on the phone, please put
11 your phone on mute.

12 Anything else you can tell me about it?

13 I hope you understand what my -- what's giving me
14 problems about it. Is there anything else you can tell me
15 about the claim, or what happened here?

16 MR. ALLARD: No, I mean, I think that the burden on
17 the claimant to put forth information really has not been met.

18 THE COURT: Well, but a proof of claim properly
19 prepared is prima facie evidence of validity and amount. The
20 objector has to come forward with competent evidence that would
21 refute at least one element of the claim. What evidence have
22 you come forward with that refutes an element of the claims set
23 forth in the proof of claim?

24 MR. ALLARD: Well, I would argue that the claimant has
25 not been damaged because we offered, to the extent that they

1 think there was some improper lien release, to work with them
2 to resolve that.

3 THE COURT: That's not evidence; come on. That
4 doesn't rebut an element -- well, let me ask you first: do you
5 believe that the proof of claim, which I'm seeing for the first
6 time, sets forth a claim which is entitled to be treated as
7 prima facie evidence of validity and amount?

8 MR. ALLARD: As far --

9 THE COURT: Did somebody -- did you have
10 somebody -- did the Trust have somebody go back and look at the
11 property records for the property in question?

12 GMAC serviced the loan; it was a mortgage on specific
13 property. The allegation is that GMAC improperly released the
14 lien, inadvertently or otherwise. There's nothing in the
15 moving papers that addresses the issue whether GMAC, in fact,
16 released the lien on the property, when it released the lien on
17 the property, who the mortgagee is; none of that is set forth
18 in the papers, is it?

19 MR. ALLARD: No.

20 THE COURT: Okay. So tell me what it is that you've
21 put forward, competent evidence that rebuts at least one
22 element of the claim?

23 MR. ALLARD: That the amount of the claim was filed in
24 the amount 160,000, but there's no evidence of any damage to
25 that effect.

1 THE COURT: If you released -- are you telling me that
2 when the proof of claim asserts that the amount of the secured
3 claim is 160,000 dollars that the -- how much was the note?
4 How much was borrowed?

5 Well, the proof of claim attaches a deed of trust; it
6 attaches a note. How much was the note for?

7 As to the blue payment rider, I don't see the -- is
8 there an amount that was borrowed?

9 Ms. Horner, can you help me here?

10 Ms. Horner, are you on the phone?

11 COURTCALL OPERATOR: Your Honor, there is no
12 appearance from Ms. Horner on CourtCall.

13 THE COURT: Okay.

14 MR. ALLARD: I don't see an amount listed here.

15 THE COURT: Yeah, I don't, either. Do you have any
16 reason to believe that 160,000 dollars that's listed as the
17 amount of the claim wasn't the amount of the --

18 MR. ALLARD: I do not.

19 THE COURT: Let me explain what I do when I get an
20 objection when there's no response that's been filed. And I
21 think somebody from your office called and asked whether we
22 would simply, since no objection was filed and and/or an order
23 to sustain an objection. And what I do in every one, in every
24 proof of claim, whether it's a ResCap or another, where there's
25 an objection to a proof of claim, we examine the papers to see

1 whether the proof of claim is properly prepared and would
2 appear to establish a prima facie basis, prima facie as to
3 validity and amount.

4 I didn't have the proof of claim. I'm looking at it
5 now; you handed it to me. It appears proper on its face: it's
6 got the deed of trust attached, GMAC gets service of the loan,
7 and the allegation is that GMAC improperly released it. You
8 have not addressed in any of your papers whether GMAC did
9 release it, properly or improperly.

10 Other than saying -- and I appreciate the difficulty
11 sometimes -- other than saying you tried to work with Bank of
12 America to see whether you could get this resolved and they
13 won't withdraw the claim, my concern is, is that you haven't
14 rebutted at least one essential, necessary element of the
15 claim. You basically have ignored it. You -- I don't mean to
16 be pejorative about it, but other than saying, look, we tried
17 to work with Bank of America, they won't withdraw the claim;
18 they told us -- hearsay -- that they're not servicing the loan
19 anymore. I don't know who the mortgagee was, I assume they
20 were servicing it for securitization trust typical.

21 Can -- what else would you like to say about it?

22 MR. ALLARD: How would you like to proceed?

23 THE COURT: With whom has your office been in touch
24 with about the claim? I see the letter is from a --

25 MR. ALLARD: Yeah, so the proof --

1 THE COURT: -- lawyer, Morris & Morris.

2 MR. ALLARD: Right, so the proof of claim was filed by
3 Morris & Morris, the attorney on the proof of claim no longer
4 is -- I believe, works there. So we've been contacting the
5 attorney who took over the matter which was named Matthew Green
6 of Morris & Morris.

7 (Pause)

8 THE COURT: Do you have any idea who owns the loan
9 now?

10 MR. ALLARD: I do not.

11 THE COURT: Do you know what the status of the loan
12 is? In the fall -- current is -- do you know anything about
13 the status of the loan?

14 MR. ALLARD: I don't.

15 (Pause)

16 THE COURT: To show cause, indicating that this
17 objection to Bank of America, claim number 5271 came on for a
18 hearing on March 23rd, 2017. No response to the objection was
19 filed on behalf of Bank of America, and no one appeared for
20 Bank of America at the hearing.

21 Unless Bank of America files a response to the motion
22 contesting the grounds for the objection, on or before 5 p.m.
23 March 30, 2017, the objection will be sustained in the claim
24 5271, expunged.

25 Trust counsel shall serve a copy of the OSC on counsel

1 for Bank of America and file certificate of service on the
2 docket. We'll see whether Bank of America does something in
3 response or not. If they do respond and contest the objection,
4 I'm probably going to set it for another hearing. And if I do,
5 I probably will enter an order requiring they make some showing
6 and explain what happened here. Okay.

7 MR. ALLARD: That's fair.

8 THE COURT: I just, I've got a proof of claim that on
9 its face appears to stay the claim, and no response is required
10 to an objection to a claim. If no response is filed, the Court
11 has to examine the claim to determine whether it's properly
12 prepared and is entitled to its prima facie evidence of
13 validity.

14 Now, that's the circumstance I find myself in. Simply
15 saying that somebody talked to a lawyer for BofA and you
16 couldn't get them to withdraw the claim, and without explaining
17 any of the facts about what really happened is just not enough,
18 so that's what I'm going to do.

19 MR. ALLARD: Okay, thank you, Your Honor.

20 THE COURT: Okay. Thank you, Mr. Allard.

21 MR. ALLARD: And the next matter on the agenda is the
22 motion of the ResCap Liquidating Trust for a final decree,
23 closing the Chapter 11 case of Executive Trustee Services, LLC.
24 That was filed on February 21st, 2017, and can be found on ECF
25 number 10311.

1 If I may provide a little background: as I'm sure you
2 are well aware, the Chapter 11 cases from the petition date
3 consisted of the jointly administered cases of fifty-one
4 debtors. Under the confirmed plan, the fifty-one debtors were
5 consolidated into three debtor groups to receive distributions
6 on allowed claims: the ResCap debtors, the GMAC mortgage
7 debtors, and the RFC debtors.

8 In addition, although technically part of the GMAC
9 debtor group claims against Executive Trustee Services are
10 entitled to different treatment. So previously in these cases,
11 we moved and got approval to close forty-seven of the fifty-one
12 cases, which left open the lead debtor case and the case of
13 ETS. And today we seek to move just the additional case of
14 ETS; the purpose is mostly administrative and reducing the --

15 THE COURT: Yes, so the Moss claim remains.

16 MR. ALLARD: Right.

17 THE COURT: Tell me how any recovery by Mr. Moss will
18 be handled if I close the ETS case?

19 MR. ALLARD: So distributions are conducted by the two
20 trusts: the Liquidating Trust and the Borrower Claims Trust.

21 THE COURT: Your claim would be under the Borrower
22 Claims, then?

23 MR. ALLARD: Yes, his claim is currently, as you know,
24 being litigated with the Borrower Claims Trust, so any recovery
25 that he is entitled to would come from funds that have already

1 been --

2 THE COURT: That's fifty million dollars that we're --

3 MR. ALLARD: Yes, it was --

4 THE COURT: -- the Borrower Claims Trust.

5 MR. ALLARD: Well, under the plan it was 57.6 million;
6 it was reduced slightly for certain pre-confirmation date
7 distributions, so I think it was -- ended up being about 56.1
8 million. But any recovery that he's entitled to would come
9 from funds already with the borrower trust, and not from the
10 estate of ETS.

11 THE COURT: And so your position is, Mr.
12 Moss -- there's no prejudice to Mr. Moss if the ETS case is
13 closed; is that a fair statement?

14 MR. ALLARD: That's fair.

15 THE COURT: So what happens to ETS's documents in the
16 case is closed?

17 I'm just -- the case is coming up for trial. I don't
18 remember now whether or what the status -- I think discovery is
19 closed, but maybe it is; maybe it isn't. Let's assume it's
20 not. What is happening to ETS's documents if the case is
21 closed?

22 MR. ALLARD: Well, so the -- at a high level, I
23 believe all the estates -- the successors -- the Liquidating
24 Trust which will still be in existence, and I think there's
25 cooperation agreement in place between the Borrower Claims

1 Trust and Liquidating Trust, so I don't think anything would
2 change in terms of the documents as long as --

3 THE COURT: Well, I don't know what that means, so
4 what is the borrower's claim trust in possession of all ETS
5 documents that still exist today?

6 I just -- look, Mr. Moss, I know you served and I read
7 that you served Mr. Moss. He hasn't filed an objection. I
8 don't want to find myself in trial on the Moss claim and have
9 an issue arise about documents relating to the Moss claim; he
10 serves trial subpoenas. I need to know that the borrower's
11 claim trust will accept any trial subpoena or documents -- may
12 be an issue about the scope or relevance, but if the ETS case
13 is closed that the borrower's claim trust will accept any trial
14 subpoena served by Mr. Moss and produce any responsive
15 documents, make any motion if there's a dispute about it. I
16 don't want -- I'm not going to close the case if doing so in
17 any way impairs or affects stability of Moss, the claims trust,
18 or me to resolve the Moss claim. It's going to go to trial;
19 unless it's settled it's going to trial.

20 And I read your motion. In theory, I don't have a
21 problem with it. I understand that the distribution to Moss,
22 if any, would come from the borrower's claims trust. But I
23 need to be satisfied that closing the case will not affect or
24 impair the parties' ability to try the case.

25 MR. ALLARD: My understanding is it would not at all.

1 I don't want to speak for the Borrower Claims Trust.

2 THE COURT: Mr. Rosenbaum.

3 MR. ROSENBAUM: Norm Rosenbaum, Morrison & Foerster
4 for the ResCap Borrower's Claim Trust. Your Honor, I wasn't
5 aware that there would be any issue with document preservation
6 in terms of closing the ETS case. I share Your Honor's concern
7 and I believe that --

8 THE COURT: I don't want a bad surprise when I get to
9 trial.

10 MR. ROSENBAUM: I appreciate it, Your Honor. I think
11 we could all be on the same page in this, so I'll just
12 coordinate. There shouldn't be -- document preservation, as
13 Mr. Allard was referring to, there's the cooperation agreement.
14 I can't say that the --

15 THE COURT: Well, the case is closed; who is it going
16 to cooperate with?

17 MR. ROSENBAUM: Well, the Trust is obligated to
18 cooperate -- the two trusts are obligated; the Liquidating
19 Trust is supposed be the --

20 THE COURT: Right.

21 MR. ROSENBAUM: -- depositor (ph.) of the documents,
22 so I think we'll just coordinate and make sure there's not
23 going to be any issues with any access to documents. I can't
24 sit here and say the borrower's trust has every document in its
25 possession that they need for the Moss matter or any other

1 matter. They do rely on the Liquidating Trust, and
2 their -- and some of this is imaged electronics -- electronic
3 images on different servers. So I think we just need to
4 coordinate and make sure there's just not going to be
5 any -- there has to be preservation of all these documents that
6 I'm happy to coordinate.

7 THE COURT: Well, isn't the -- I don't see anything in
8 the order about preservation of documents.

9 MR. ROSENBAUM: Well, I think the two trusts should
10 coordinate and make sure that that's a part of the --

11 THE COURT: Well, that's just not good enough for me;
12 I need -- look, Mr. Allard, I'm prepared to close the case, but
13 you're going to have to modify the order to provide for
14 preservation of ETS records. I don't want to find out that I
15 close the case today and the Moss claim goes to trial and,
16 oops, ETS's records were destroyed when you, Judge, approved
17 the closing of the case.

18 And is this the only remaining claim against ETS?

19 MR. ALLARD: That's correct.

20 THE COURT: I want to see a revised order on closing
21 the case. Work out with Mr. Rosenbaum; I want to be satisfied
22 that the order addresses preservation of records.

23 MR. ALLARD: We are happy to do that.

24 THE COURT: You know, I've just been -- well, I have
25 just been through this in another case where there's an issue,

1 I had been doing it. We had the district attorney, I had
2 private parties, I had others; they were happy to have the duty
3 case closed but the preservation of records was a big deal.
4 And so I think the order ultimately provided for -- it
5 had -- there electronic records, there were some paper records.

6 I understand you want to get the case closed; I'm
7 happy to get the case closed, but I just don't want a bad
8 surprise with the Moss claim. I know you didn't file anything,
9 but unless the case is -- unless the claim is resolved, it's
10 going to trial.

11 MR. ALLARD: Correct. Okay, we're happy to do that.

12 THE COURT: So confer with Mr. Rosenbaum, come up with
13 a draft order.

14 I assume the U.S. Trustee -- has the U.S. Trustee seen
15 your proposed order?

16 MR. ALLARD: Yes.

17 THE COURT: Okay. Share a revised draft with the U.S.
18 Trustee, as well, and advise the Court what the status is. So
19 I'm going to conditionally grant the motion to close the ETS
20 case, subject to reviewing an order that adequately deals with
21 the preservation of records, okay.

22 MR. ALLARD: Thank you, Your Honor.

23 THE COURT: The records may already be in the
24 possession of the borrower's trust; I don't know, I just don't
25 know.

1 Do you know, Mr. Rosenbaum?

2 MR. ROSENBAUM: As I said before, I can't say as a for
3 certainty every record is with the Trust. I know they rely on
4 the liquidated trust.

5 THE COURT: Sure. Okay, I just don't -- it's not that
6 I don't accept your representation, Mr. Rosenbaum, but I just
7 want to be sure that, is there going to be consequences if they
8 are a required preservation and it turns out they weren't
9 preserved. Everybody ought to understand that.

10 MR. ALLARD: Correct.

11 THE COURT: Okay.

12 MR. ALLARD: Thank you.

13 THE COURT: All right, Mr. Allard; thank you.

14 Ms. Arett?

15 MS. ARETT: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. ARETT: Jessica Arett of Morrison Foerster, on
18 behalf of the ResCap Borrower Claims Trust.

19 The next matter on the agenda is number 3, the
20 Borrower Trust's ninety-fifty omnibus objection to claims, no
21 liability borrower claims, reduce and allow borrower claims,
22 and allow and full borrower claim. It was filed at docket
23 number 10296 on February 2nd, 2017.

24 I don't know if -- I know we received a response from
25 Mr. Kennedy; I don't know if he is on the line.

1 THE COURT: Mr. Kennedy, are you on the line?

2 MR. KENNEDY: Yes, I am --

3 THE COURT: Thank you, Mr. Kennedy.

4 MR. KENNEDY: -- Your Honor.

5 THE COURT: All right, that's the only -- is that the
6 only response you received?

7 MS. ARETT: Yes, it is.

8 THE COURT: Okay. So I have reviewed, we'll
9 deal -- we'll talk about the Kennedy claim in a minute.

10 MS. ARETT: Okay.

11 THE COURT: The -- and I guess, what, there were
12 several categories of -- in your -- that you grouped objections
13 in various categories; why don't you just briefly describe?

14 MS. ARETT: Correct. So there -- so through the
15 ninety-fifth omnibus objection, we seek to expunge four proofs
16 of claim that do not represent valid pre-petition claims
17 against the debtors; those would be the no liability borrower
18 claims. The borrower trust thoroughly examined the debtors'
19 books and records in an effort to validate the accuracy of the
20 allegations made in those claims, and determined that the books
21 and records do not show any liability due and owing the
22 claimants. The borrower trust also determined that two claims,
23 which were reflected on Exhibit B to the objection, those
24 would've been the reduce and allow borrower claims --

25 THE COURT: Well, let me just -- the ones you see in

1 disallow order, the four, 10/5th claim: 1015, 2549, 1039, and
2 5634.

3 MS. ARETT: So 1015 was actually one that we withdrew
4 the objection to.

5 THE COURT: Okay. All right.

6 MS. ARETT: So -- and then I think you left out Mr.
7 Kennedy's claim, 4930.

8 THE COURT: I know. We're going to talk about --

9 MS. ARETT: Yeah, yeah.

10 THE COURT: -- Mr. Kennedy's separately here.

11 MS. ARETT: Correct, so there were --

12 THE COURT: So 1015 is out, so it's 2549, 1039, 5634?

13 MS. ARETT: Correct, and then the fourth one was Mr.
14 Kennedy's.

15 THE COURT: All right, we're going to deal with Mr.
16 Kennedy's separately.

17 MS. ARETT: Right. Correct.

18 THE COURT: As to the three, 1015,
19 2549 -- not -- excuse me, not 1015. 2549, 1039, and 5634, the
20 objection is sustained --

21 MS. ARETT: Thank you, Your Honor.

22 THE COURT: -- and the claims are expunged.

23 Okay, so go to the next category.

24 MS. ARETT: Okay, so the next category, which
25 reflected on Exhibit B, the reduce and allow borrower claims,

1 were asserted in an amount greater than that for which the
2 debtors' estates were liable.

3 THE COURT: And that's 1524 and 4921?

4 MS. ARETT: Correct.

5 THE COURT: The objection is sustained.

6 MS. ARETT: Okay.

7 THE COURT: And the claims are reduced.

8 MS. ARETT: All right. And then we also determined
9 that one claim should be allowed in the filed amount against --

10 THE COURT: 3848?

11 MS. ARETT: Yes.

12 THE COURT: All right, the claim is allowed.

13 MS. ARETT: Great. So then responses to the objection
14 were due on March 6th. As I said earlier, the borrower
15 received one response to the objection from Mr. Kennedy; that
16 was at docket number 10332.

17 THE COURT: All right, and that's claim 4930.

18 MS. ARETT: Correct.

19 THE COURT: All right.

20 MS. ARETT: And we filed a reply on March 20th, 2017
21 at docket number 10337. I'm happy to walk through --

22 THE COURT: Please do.

23 MS. ARETT: All right. So Mr. Kennedy's proof of
24 claim is based on alleged errors made by GMAC mortgage during
25 the servicing of his loan. And Mr. Kennedy asserts that GMAC

1 Mortgage placed lender insurance on his property and paid his
2 property taxes when it should not have. Mr. Kennedy also
3 asserts that GMAC Mortgage's responses to various QWRs that
4 were sent to him were inadequate under RESPA.

5 However, review of the borrower trust books and
6 records demonstrate that as to all of these allegations, GMAC
7 acted in compliance with the terms of the deed of trust and
8 applicable law.

9 THE COURT: The response that you filed concedes that
10 there's a disputed issue of fact over whether the tax bill was
11 paid, and that's in paragraph 29. This is the allegation of a
12 statutory violation of California Civil Code 2954(a)(1)(C).
13 And what do you say in paragraph 29 of the objection?

14 MS. ARETT: So I think we addressed this earlier in
15 the objection in saying that even if GMAC Mortgage had received
16 proof of the insurance, under -- because it -- or
17 sorry -- proof of the -- that the taxes were paid, because it
18 later received evidence from the San Francisco County showing
19 that the delinquent taxes had not been paid under its own
20 business practices, it would have gone forward and paid those
21 taxes anyway. So whether or not they received proof that --

22 THE COURT: Don't you -- I thought that the borrower's
23 trust concedes that there's an issue of fact whether the tax
24 bill was paid. I understand your legal position --

25 MS. ARETT: Correct.

1 THE COURT: -- but you -- is -- am I correct that you
2 agree that there's a disputed issue of fact whether Mr. Kennedy
3 paid the tax bill?

4 MS. ARETT: I think there's a disputed issue of
5 fact -- and this was not clear in the reply and I
6 apologize -- there's a disputed issue of fact as to whether or
7 not the borrower trust received evidence from Mr. Kennedy that
8 the tax bill was paid.

9 THE COURT: Okay.

10 MR. KENNEDY: Yeah, that's not correct.

11 THE COURT: Well, you'll get --

12 MR. KENNEDY: If I may interject?

13 THE COURT: -- a chance, Mr. Kennedy.

14 Mr. Kennedy?

15 MR. KENNEDY: Yes.

16 THE COURT: I'll give you a chance to respond on
17 everything, okay?

18 MR. KENNEDY: That fine. Okay, thank you.

19 MS. ARETT: Because later in -- GMAC Mortgage did
20 follow up with San Francisco County and learned that the taxes
21 had been paid, and that the records that they received from the
22 county were incorrect.

23 THE COURT: Okay, and what did GMAC do when it found
24 out that Mr. Kennedy had paid the taxes?

25 MS. ARETT: At that point, the county had applied the

1 taxes that GMAC Mortgage had paid to his December 1st, 2008
2 taxes.

3 THE COURT: And what happened to the amount that he
4 paid?

5 MS. ARETT: I believe that he did not pay his taxes in
6 December 1st, 2008.

7 THE COURT: Well, which taxes did you -- did GMAC
8 subsequently learn he had paid?

9 MS. ARETT: The taxes that he paid in July 2008, I
10 don't know exactly when those were due, but I know that they
11 were paid in July 2008.

12 THE COURT: Why doesn't the fact -- I mean, so -- all
13 right, so if the county made a mistake --

14 MS. ARETT: Um-hum.

15 THE COURT: -- the mistake being it reported to GMAC
16 that the taxes hadn't been paid when, in fact, they had been
17 paid, what's -- what are the legal consequences of that for
18 GMAC?

19 MS. ARETT: Well, I think that that's an issue that
20 Mr. Kennedy would have with the county. I don't know that
21 GMAC -- I mean, I don't think that GMAC can be responsible
22 for --

23 THE COURT: So what --

24 MS. ARETT: -- correcting every single -- like,
25 make --

1 THE COURT: Okay.

2 MS. ARETT: -- confirming with the county every single
3 time.

4 THE COURT: What evidence do I have before me that
5 shows that GMAC was informed by the county that Mr. Kennedy had
6 not paid the taxes, and on that basis GMAC paid the taxes?

7 MS. ARETT: So when GMAC Mortgage is servicing
8 notes -- okay, we'll find the exact part of the notes in a
9 second -- it's on page 156 of 158 of the servicing notes, which
10 are Exhibit D to the supplemental declaration of the reply.

11 THE COURT: Okay.

12 MS. ARETT: And the entry on October 4th reads: "Per
13 e-file September 24th, 2008, taxes are delinquent, as follows:
14 San Francisco County dispersed July 2008 second initial basis."
15 So that's the evidence that we have that GMAC Mortgage
16 received.

17 THE COURT: Okay. Address the breach of contract
18 claim.

19 Could you address the breach of contract claim?

20 MS. ARETT: Yes, so pursuant to the deed of trust,
21 GMAC Mortgage was permitted to pay delinquent property taxes
22 and hazard insurance.

23 THE COURT: I agree.

24 MS. ARETT: And did so pursuant to the deed of trust,
25 so that they're --

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27

1 THE COURT: But it's got to be delinquent.

2 MS. ARETT: It does have to be delinquent, but I mean,
3 it -- GMAC Mortgage received notice from the county in July,
4 informed Mr. Kennedy of that delinquency --

5 THE COURT: Other than the reference in the servicing
6 notes, is there a piece of paper that shows that the county
7 gave notice to GMAC that the taxes hadn't been paid?

8 MS. ARETT: The trust doesn't have that record
9 anymore, Your Honor. That we were able to locate, anyway.

10 THE COURT: All right. How much -- the Trust now
11 acknowledges that Mr. Kennedy had made the tax payment, but the
12 Trust's position is supported by the servicing notes that the
13 county had mistakenly reported that he had not paid. What was
14 the amount that GMAC advanced?

15 MS. ARETT: I believe, I'll need to confirm, is
16 \$2,939.80.

17 THE COURT: Okay. So address the issue of California
18 Civil Code 2954(a)(1)(C), the escrow -- establishing an escrow
19 account.

20 MS. ARETT: So -- sorry, let me pull, I have a copy of
21 it, so just for my own record.

22 THE COURT: Okay, sure.

23 MS. ARETT: So a review of the statute, I believe,
24 demonstrates that they're -- that the purpose of the statute
25 was to prevent a servicing company from placing what is a

1 traditional escrow account where you pay into it every month,
2 and then at the end of those six months they make the payment
3 for you, and that's just part of your monthly payment. That is
4 different, and GMAC Mortgage makes a distinction between that
5 sort of escrow account and the type that was placed on Mr.
6 Kennedy's account at this point. And they make that
7 distinction in the servicing notes.

8 THE COURT: Okay, so GMAC, when it received notice
9 that Mr. Kennedy had not paid the taxes, which was in error,
10 the information was in error, it established an escrow at that
11 point?

12 MS. ARETT: It -- yeah, well -- yes, so it created an
13 account that Mr. Kennedy would be paying into that would, once
14 the payment that GMAC Mortgage had paid was paid off.

15 THE COURT: Yes.

16 MS. ARETT: But then the escrow account would go away,
17 so it isn't --

18 THE COURT: And how much -- what was the time gap
19 between the time that GMAC made the tax payment and learned
20 that, in fact, Mr. Kennedy had done so?

21 MS. ARETT: So GMAC made the payment on October 4th,
22 and I believe they learned of the -- that Mr. Kennedy made the
23 payment in May 2009; I don't know the exact date.

24 THE COURT: October 4th of which year?

25 MS. ARETT: Of 2008.

1 THE COURT: Okay.

2 MS. ARETT: So --

3 THE COURT: And what happened to the escrow when GMAC
4 learned that Mr. Kennedy had made the tax payment?

5 MS. ARETT: Well, at that point, the county couldn't
6 provide a refund to GMAC Mortgage because it had paid -- it had
7 used GMAC Mortgage's funds to pay Mr. Kennedy's December 2008
8 payment. So at that -- GMAC Mortgage would only remove the
9 escrow if it had received a refund in the amount that it paid
10 out, which it didn't because the county had then paid -- used
11 that money to pay Mr. Kennedy's taxes going forward.

12 THE COURT: Okay.

13 MS. ARETT: Yeah.

14 THE COURT: Okay, deal with the rest of the claim.

15 MS. ARETT: So there were four QWRs that --

16 THE COURT: You acknowledge that they were proper
17 QWRs?

18 MS. ARETT: Yes, Your Honor.

19 THE COURT: Okay.

20 MS. ARETT: So there was the December 26th, 2009 QWR,
21 which GMAC responded to on January 22nd, 2010. There was
22 another QWR that was sent on January 19th, 2012 that GMAC
23 responded to on February 6th, 2012. There was a SQR on May
24 14th, 2012 that GMAC responded to on June 5th of 2012. And
25 then a fourth one on August 4th, 2012 that GMAC responded to on

1 August 10th.

2 And a review of the responses that GMAC Mortgage
3 provided, it addressed all of the issues that Mr. Kennedy
4 raised, and it -- if you look at the actual requires of RESPA,
5 it's just that GMAC Mortgage had to explain why it believed
6 that Mr. Kennedy's account was correct, which it did. It
7 needed to provide him with a phone number and with various
8 departments within GMAC Mortgage, which it did. It also
9 provided him with copies of his servicing notes, his deed of
10 trust, his note, and various other documents that were
11 requested.

12 THE COURT: Okay.

13 MS. ARETT: So it is our position that it was -- that
14 the responses were sufficient under RESPA.

15 THE COURT: All right, address his FDCPA and Rosenthal
16 Fair Debt Collection Practices Act, Civil Code 1788 claim.

17 MS. ARETT: So Mr. Kennedy raised these for the first
18 time in his response, but even if we were to relay that back to
19 the filing of the petition -- of the bankruptcy case -- they
20 would still be untimely. Under both of those statutes, there's
21 a year statute of limitations. Even being extremely generous
22 and saying that he did not realize the errors that were made
23 until his first QWR was mailed out, that's still December of
24 2009, which means that the statute of limitations expired in
25 December 2010, so --

1 THE COURT: Is it the same statute of limitations
2 under the Rosenthal Act?

3 MS. ARETT: Yes, both one year.

4 THE COURT: All right. Okay.

5 Mr. Kennedy, do you want to go ahead and respond?

6 MR. KENNEDY: Okay. First of all, the -- my claim has
7 been completely misstated. The issue with California Civil
8 Code 2954 is not whether -- this is not whether or not GMAC
9 paid my taxes, but the fact that they opened an escrow account
10 for the payment of the taxes. California 2954 prohibits that,
11 unless the borrower falls into one of seven exceptions. And
12 the closest exception that I can think of because they -- they
13 haven't said what exception that would be -- is that you
14 have -- it's required that you must miss -- have two delinquent
15 tax payments -- two consecutive delinquent tax payments before
16 GMAC could have done what they did as far as establishing an
17 escrow account.

18 Whether or not they paid the taxes, whether or not I
19 had already paid them, that's irrelevant. The law specifically
20 states that you have to have two delinquent taxes in a row in
21 order for somebody to be able to open an escrow account for the
22 payment of taxes, and that was not the case. My taxes
23 were -- none of my taxes were left delinquent at that point.

24 THE COURT: Is it fair to say --

25 MR. KENNEDY: Then --

1 THE COURT: Mr. Kennedy, may I ask a question? So I
2 understand the issue about the tax bill, which you did pay and
3 GMAC servicing notes reflect they were advised that you hadn't
4 paid. Did you miss the next tax payment?

5 MR. KENNEDY: I went to make the tax payment, I
6 had -- I had informed GMAC continuously, before the payment and
7 then after the -- after they made the payment, I told them you
8 need to call and get a refund. They would not refund the money
9 to me because I didn't make the payment, and GMAC refused to do
10 that.

11 Finally, I -- I persisted with that. Finally, in May
12 of the following year is when they called and the tax payment,
13 of course, by then had been applied to my December -- the
14 following payment, December of -- of 2008. And so that's why
15 the payment -- that's why the refund wasn't available. Had
16 they called them and asked for a refund immediately, you know,
17 when I notified them that there's a surplus and you need to get
18 it back, they would've gotten the refund. But they didn't.

19 And had they done that, we wouldn't be here today
20 because that would've prevented any other damages from
21 occurring, my account would've been correct, and it would've
22 been resolved.

23 THE COURT: All right, I understand your argument
24 about 2954, it's California Civil Code, Section 2954. Could
25 you address the breach of contract claim?

1 MR. KENNEDY: Yes, because -- because they went ahead
2 and -- and opened an escrow account, once again, against
3 California Civil Code, the deed of trust requires that they
4 follow local regulations with regard to escrow accounts. And
5 therefore, they did not, and they then breached, by opening the
6 escrow account, they breached the deed of trust. Also,
7 they -- they then charged me for the related escrow charges for
8 that payment that were prohibited by the law. And that is also
9 in breach of -- of the contract. And when I made the payments
10 of principal and interest only, they divert -- they called my
11 payment insufficient and put it in a suspense account, and then
12 diverted funds from that payment to pay for those unwarranted
13 escrow charges. And that's a breach of -- of the contract.

14 Also, there was another escrow issue regarding
15 property insurance, and that only involves the fact that on an
16 escrow statement that I received from GMAC in -- for August, it
17 stated that if the amount for the insurance is paid in full, it
18 will be automatically -- my payment for November 1st, 2008,
19 will automatically be adjusted back to principal and interest
20 only. I provided proof of insurance; the funds were completely
21 refunded, and the policy was cancelled on October 23rd. Yet,
22 my payment for November 1st was not automatically adjusted as
23 stated on the escrow analysis, and they considered my payment
24 of principal and interest only insufficient and put my funds in
25 a suspense account, and then charged me later diverted funds to

1 pay for that -- to pay for that escrow charge.

2 It was then removed the following month. So
3 they -- they didn't do it as they state. And each escrow
4 analysis that I would ever get had a similar statement that if
5 you do this, if you pay this amount, then it will be removed by
6 such a date. And they never followed their own policy, as far
7 as removing the -- the charges, and therefore, that's a breach
8 of -- of contract with that.

9 THE COURT: All right, could you address --

10 MR. KENNEDY: And --

11 THE COURT: Could you address the RESPA claim, that's
12 the Real Estate Settlement Procedures Act.

13 MR. KENNEDY: Yes. Oh, and just one other thing,
14 going back to the tax issue.

15 THE COURT: Yes, go ahead.

16 MR. KENNEDY: They -- she stated that -- that they
17 received notice from the county on October 4th, stating that my
18 taxes were delinquent. The county does not have records, and
19 they don't keep records as far as which properties have
20 mortgages that are not -- let alone who the servicer is, and
21 they do not send emails to mortgage companies telling them
22 that, you know, this property is delinquent on a property tax.
23 So for them to -- and I continually requested a copy of this
24 claimed email that they received on October 4.

25 Furthermore, October 4th is a Saturday, when the

1 government offices will be closed. So that is the reason why
2 opposing counsel cannot find this supposed email because it
3 doesn't exist.

4 THE COURT: Okay.

5 MR. KENNEDY: So -- and -- and that leads into the
6 QWRs. Each and every QWR that I sent, and there -- there are
7 five of them, not four; there was a fifth one that was sent in
8 October -- I think it was of 2009, that is included in my
9 response to the objection. That was outside of the statute of
10 limitations to be included in my claim for damages, so I didn't
11 include it earlier. But it does support the fact that there
12 were five QWRs in total, but of which GMAC did not respond to
13 sufficiently in accordance with RESPA requirements.

14 Now, given -- given the situation regarding the taxes,
15 in -- in each and every letter that I would send, I would state
16 that General Motors -- GMAC paid my taxes when taxes had
17 already been paid, and opened an escrow account wrongfully for
18 those charges. And this goes to even before I learned two
19 years later about count -- you know, about the Civil Code 2954.
20 I -- I had -- and so anybody who is doing the research
21 investigating my QWR claims that -- that I believe my account
22 is wrong because General Motors paid -- GMAC paid my taxes when
23 they had already been paid and opened an escrow account. That
24 should be a red flag to anybody that has to deal with these tax
25 situations because -- because 2954 affects every single

1 mortgage in California serviced by GMAC.

2 And so it's not like a narrow -- a narrow scope type
3 of regulation; it -- it's something that they need to know in
4 order to operate properly within the law. And yet, there isn't
5 a single QWR response that ever is -- and even when I learned
6 of the law and then -- and asked them to address that
7 specifically, it's completely ignored. And then it's like
8 the -- so it's never included in the investigations that they
9 do, and that's a requirement for GMAC to have fulfilled in
10 order to, you know, meet RESPA requirements.

11 In addition to that, I can go QWR by QWR of -- of they
12 say that they provided, for example, transaction histories.
13 Well, three -- three out of the four QWRs in 2012, they provide
14 transaction histories that don't cover the dates of -- of the
15 errors that I'm talking about. Only one QWR provided proper
16 transaction histories for the complete time that I asked, and I
17 asked for the inception of the loan to present day. And their
18 claim of -- also, I do have to go -- I want to make a note
19 about -- there's a claim that the deed of trust -- I don't
20 (indiscernible) around but the -- they claim the deed of trust
21 allows them to have paid my taxes.

22 Since payment of the taxes is not an issue with the
23 breach of contract, but the opening of an escrow account is,
24 the deed of trust does not -- it allows GMAC Mortgage to -- I'm
25 not going to say allows them to -- to pay the taxes, but it

1 does. They're not -- it doesn't allow them to open an escrow
2 account; they -- they forgot to mention that part. It -- it
3 allows them to add the amount that they've spent on my behalf
4 to my total outstanding mortgage whereby I'd be charged
5 interest according to the note as if it were -- were a lump sum
6 was my -- was my outstanding balance. It says nothing about
7 allowing them to open an escrow account. So that refutes that.

8 But --

9 THE COURT: All right, could you address -- Mr.
10 Kennedy, could you address the Fair Debt Collection Practices
11 Act and Rosenthal Fair Debt Collection Practices Act? The
12 issue there being the statute of limitations.

13 MR. KENNEDY: Yes, let me get here. One second.

14 Just one moment and I'll find it in my notes here.

15 THE COURT: That's fine, go ahead.

16 MR. KENNEDY: Thank you.

17 Let's see. All right, there is -- let me
18 see -- there's a law page that quotes a -- a California law
19 provides -- has a continuing violation doctrine, which applies,
20 and what that does is it -- it -- the statute of limitation
21 starts from the last violation that was -- that occurred by
22 GMAC Mortgage, not from the first time when it happened. And
23 so because GMAC kept sending me demand letters and kept
24 pursuing debt collection activities when, you know, they're not
25 allowed to, right through to the end when they turned the

1 account over to Ocwen in 2013; that's when the statute of
2 limitations would -- would start, and that's well within the
3 time frame of -- of when I filed.

4 THE COURT: All right, and --

5 MR. KENNEDY: And there's also a -- a federal law that
6 does the same -- that -- that does the same thing, let me just
7 find that.

8 There's a -- a case, Padilla v. Payco General American
9 Credits, and it says here, "without citing any legal authority,
10 Payco contends that the statute of limitations prohibits
11 Padilla from raising any facts or allegations because of the
12 one-year statute of limitations". It says, "however, the
13 statute of limitations is not intended to deprive plaintiffs of
14 the use of evidence of violations that took place of more than
15 a year after the statute has" -- "the statute of limitations
16 has come into effect. But rather than to protect defendants by
17 ensuring that the action is filed within one year of the most
18 recent date on which the defendant is alleged to have violated
19 the FCPDA."

20 THE COURT: All right, Ms. Arett, could you respond,
21 please?

22 MR. KENNEDY: And --

23 THE COURT: That's fine, Mr. Kennedy.

24 MR. KENNEDY: Okay.

25 THE COURT: Let me hear from the trust counsel.

1 MS. ARETT: So --

2 THE COURT: We'll deal with the statute of limitations
3 on FDCPA (sic) and Rosenthal first. Is Mr. Kennedy correct
4 that the statute runs from the last violation, and he alleges
5 the last violation is within the statute of limitations?

6 MS. ARETT: Well, I would say here that the violation
7 that Mr. Kennedy alleges is the taxes, and so I don't know what
8 the continuing violation would be.

9 THE COURT: What are you -- but you were
10 continuing -- not you, obviously -- GMAC was continuing to try
11 to collect from him assorted deficiencies and amounts shortages
12 that they were trying to collect; is that true or not?

13 MS. ARETT: So are you -- I mean, the -- I don't know
14 exactly at what point Mr. Kennedy paid off the tax deficiency,
15 so I don't --

16 THE COURT: Well, he says he didn't have a tax
17 deficiency.

18 MS. ARETT: Well, right, but I'm saying if that was
19 the continuing violation, I don't know exactly when that --

20 THE COURT: Um-hum.

21 MS. ARETT: -- finalized, no, so --

22 THE COURT: All right. Deal with his RESPA demand.

23 MS. ARETT: The RESPA --

24 THE COURT: RESPA.

25 MS. ARETT: Regarding the QWRs?

1 THE COURT: Yes.

2 MS. ARETT: I mean, I -- if you look at the responses,
3 I believe that GMAC Mortgage appropriately responded to every
4 single one of --

5 THE COURT: All right.

6 MS. ARETT: -- his QWRs. I mean, it -- if you look
7 through, they provided -- so let's -- starting with the first
8 one, they provided him with the history of the period that he
9 is complaining of going back 2008 and 2009. Prior to 2008, Mr.
10 Kennedy didn't have really any long -- I mean, he made his
11 payments.

12 Then in the February 2012, they provided him with,
13 again, account notes 2009 -- let me see what the
14 actual -- sorry.

15 So 2012 through -- actually, I don't know what the
16 final date there was.

17 THE COURT: Well, Mr. Kennedy, how much in damages are
18 you seeking to recover?

19 MR. KENNEDY: Well, because of the -- and I didn't
20 know about this when I filed the claim -- but because of the
21 RESPA violations, and actually, the -- the totaling, if you
22 will, or whatever, of the FCPDA and the Rosenthal is also
23 related to the fact that I never received a response to my
24 validation of that request. What I did receive, and -- and
25 only figured it out recently, was a -- was a copy of a response

1 to a letter that I sent to GMAC's tax department.

2 GMAC has been able -- unable to present to me a
3 response to -- to that validation request. And that, after
4 thirty days, prevents them from being able to pursue debt
5 activity at all. So that's that matter.

6 But I'm sorry, what was your question; I apologize.

7 THE COURT: How much in damages are you seeking to
8 recover?

9 MR. KENNEDY: Oh, so I have emotional damages then
10 that I did not include because I didn't know that I -- that I
11 could, and so it -- the total is 94 -- I think, 94,000 dollars.

12 THE COURT: How do you calculate the 94,000?

13 MR. KENNEDY: Okay, let me get to my spreadsheet here.

14 (Pause)

15 MR. KENNEDY: Okay. I had to directly sell an IRA in
16 order to pay the amounts that they needed for the workout
17 program to prevent them from selling my house. That was valued
18 at 31,684 dollars. What I've asked for, for that is the -- is
19 the interest of -- let's see here -- 5,473 dollars for that,
20 which is calculated from the time that I had to cash in the IRA
21 until the time GMAC declared bankruptcy. I had to pay taxes on
22 that IRA plus a penalty, totaling 7,695 dollars. And then
23 there was an additional 1,100 dollars in interest.

24 Late fees are totaled 3,431 dollars, plus 800 dollars
25 in interest. The buyer -- BPOs that totaled 4,500 dollars,

1 plus 1,100 dollars in interest. Fees that I was charged of
2 4,100 dollars.

3 THE COURT: What were the fees?

4 MR. KENNEDY: Plus 1,500 dollars --

5 THE COURT: What were the fees for?

6 MR. KENNEDY: Well, that's what I wanted to know
7 because that also is requested in my QWRs and I never received
8 a response. So I never had a breakdown of what the fees are
9 for. And I --

10 THE COURT: May I ask you --

11 MR. KENNEDY: And I asked --

12 THE COURT: Mr. Kennedy, what was --

13 MR. KENNEDY: Yes.

14 THE COURT: What were the payments for which -- that
15 you had to make for which you had to cash in your IRA?

16 MR. KENNEDY: Well, the loan monthly payment was 1,700
17 dollars. I had to make monthly payments of approximately 5,000
18 dollars a month for six months.

19 THE COURT: Why?

20 MR. KENNEDY: Because they -- because I was not paying
21 the escrow charges because I did not feel that they
22 were -- were proper, and continued just to pay my monthly
23 payment of interest and principal. And they then pushed
24 my -- that caused my house to go into default and they actually
25 sent me a notice of sale. And there were attorney's fees and

1 whatnot, so in order to recoup all of that I had to pay it all
2 off in -- in six months' time. They also refused my first
3 payment, telling me later that it had to come by cashier's
4 check, and I was never aware of that. And I asked them
5 in -- in the QWRs for copies of the signed agreement that says
6 that -- that shows that I was aware of that, and they -- they
7 never addressed that; they never provided that information.

8 So yeah, so all the sudden I had to come up with 4,000
9 dollars one month to make -- to save my house. So I -- I had
10 to sell my IRA.

11 THE COURT: Okay. All right, I -- I'm going to
12 overrule the trust's objection to claim 4930 without prejudice.
13 The matter needs to be set down for trial.

14 Is there any discovery that you wish to take, Mr.
15 Kennedy? Do you have the documents you believe you need to
16 prove your claim?

17 MR. KENNEDY: Yes.

18 THE COURT: Okay.

19 MR. KENNEDY: I believe so.

20 THE COURT: All right.

21 MR. KENNEDY: Yes, I do.

22 THE COURT: Ms. Arett, is there any discovery you wish
23 to take?

24 MS. ARETT: At this time I can't think of anything,
25 but I'd like to reserve the rights of the bar interest.

1 THE COURT: Well, I'm going to enter a case management
2 order --

3 MS. ARETT: Okay.

4 THE COURT: -- and that's why I'm asking whether there
5 is -- do you want to take his deposition; what is it that you
6 want to take?

7 MS. ARETT: I think we would need --

8 THE COURT: He's itemized --

9 MS. ARETT: -- we need information regarding his --

10 THE COURT: Stop, stop, stop. He's described in
11 some -- with some specificity, the items that he's seeking to
12 recover in damages; do you have those documents?

13 MS. ARETT: We have -- he provided them in his
14 response.

15 THE COURT: Okay.

16 MS. ARETT: I think we would need to take discovery
17 regarding the -- like, the IRA and other --

18 THE COURT: Okay.

19 MS. ARETT: -- like, because he alleges that his
20 credit was affected --

21 THE COURT: All right, here --

22 MS. ARETT: -- and so we would need discovery of
23 credit --

24 THE COURT: -- is what I -- Ms. Arett, I would like
25 for you or your colleagues to prepare a case management and

1 scheduling order, providing sixty days for fact discovery.

2 This is not a matter that requires expert testimony, so it's
3 sixty days for fact discovery.

4 Talk to Mr. Kennedy and agree on a date for the next
5 case management and scheduling conference about two weeks
6 before -- you can get a date from Deanna for that, my courtroom
7 deputy. Mr. Kennedy, you'll be able to appear by telephone. A
8 case management and scheduling conference about two weeks
9 before the time for fact discovery runs out.

10 Mr. Kennedy, what you'll see -- there's the case
11 management scheduling order is a form that I use; it's on the
12 Court's website so you can see what it looks like, but Ms.
13 Arett will follow that form. And it requires that usually face
14 to face, but you're in California, so you and the trust counsel
15 need to confer within fourteen days from the entry of the order
16 about settlement or alternate dispute resolution to try and
17 resolve the claim. And you need to confer, again, you always
18 confer about settlement, but you absolutely need to confer
19 again, within fourteen days after the close of fact discovery.

20 When we have the next case management conference, if
21 the matter hasn't been resolved, I'll give a deadline for
22 submitting a joint pre-trial order. That again, is a form, Mr.
23 Kennedy, that appears on the Court's website and Ms. Arett can
24 send you what the form looks like. That has to be completed
25 entirely.

1 You can't -- if the matter goes to trial you have to
2 be here for it, I don't permit people to appear by telephone
3 during trial, so you would have to be here for the trial.

4 Where do you live, Mr. Kennedy?

5 MR. KENNEDY: Palm Springs in Southern California.

6 THE COURT: Okay. So I have no problem about, for any
7 of these pre-trial hearings, for you to report by telephone as
8 you are today. But if the matter goes to trial, you actually
9 have to be here and you have to be prepared to testify.

10 There are other documents that have to be filed before
11 trial, the exhibits and things like that, but I'm not going to
12 get into that today. So what I urge both sides to do is to
13 confer whether settlement is possible.

14 But -- so submit the proposed order, Ms. Arett. Make
15 sure you confer, in terms of the sixty days, that that's what
16 I'm telling you for fact discovery, and there's no time for
17 expert discovery. In terms of scheduling the case management
18 conference, I don't know whether the trust has any omnibus days
19 that are set already about two weeks -- approximately two weeks
20 before the end of fact discovery.

21 During that -- and talk to Mr. Kennedy and make sure
22 he's available for that. I guess it's early in the morning for
23 you, Mr. Kennedy, but is -- I usually start my calendar at 10
24 o'clock. Are you able to do that?

25 MR. KENNEDY: Yes, absolutely, Your Honor.

1 THE COURT: Okay. And we will see whether you can
2 settle this claim, Ms. Arett.

3 Some of the -- I'm not ruling on anything today, other
4 than that I'm overruling the trust's objection for the reasons
5 that I believe, are disputed issues of fact as to all the
6 claims. Some of the items of damages that you've described to
7 me, I think you may have a really hard time recovering, Mr.
8 Kennedy, so I know -- and I'm not saying you won't and I'm not
9 saying you will, I'm just -- this isn't the time when you
10 really have to lay it out in detail, but I just -- as I
11 listened to you, you may have a hard time recovering the amount
12 that you're seeking. So keep that in mind when you talk with
13 the trust counsel about settlement and, if necessary, we'll go
14 to trial. It's -- that's where we are, okay.

15 Anything else you want to say, Mr. Kennedy?

16 MR. KENNEDY: No, that's fine, thank you very much for
17 your --

18 THE COURT: Okay.

19 MR. KENNEDY: -- time, Your Honor.

20 THE COURT: Ms. Arett, anything you want --

21 MS. ARETT: No, Your Honor.

22 THE COURT: Okay. Is there anything else for me to
23 deal with today?

24 MS. ARETT: No, that's it.

25 THE COURT: Okay, so I am so ordering -- I don't need

1 a written order on this -- I'm so ordering the transcript that
2 the objection is overruled without prejudice and the matter
3 will go forward in the manner that I've described, and so
4 confer with Mr. Kennedy and see whether you can work with the
5 schedule, okay?

6 MS. ARETT: Sounds good.

7 THE COURT: All right, thanks very much. All right,
8 we're adjourned.

9 (Whereupon these proceedings were concluded at 11:25 AM)

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true
and accurate record of the proceedings.



DENA PAGE

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Date: March 24, 2017

March 23, 2017

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